

## FIU Law Review

---

Volume 2 | Number 1

Article 6

---

Winter 2007

### In Search of Truthiness

Susan Balter-Reitz

*Montana State University-Billings*

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Other Law Commons](#)

---

Online ISSN: 2643-7759

#### Recommended Citation

Susan Balter-Reitz, *In Search of Truthiness*, 2 FIU L. Rev. 7 (2007).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol2/iss1/6>

This Symposium is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact [lisdavis@fiu.edu](mailto:lisdavis@fiu.edu).

## In Search of Truthiness<sup>1</sup>

Susan Balter-Reitz<sup>2</sup>

- A 2006 Pew Research Study found that 50 million Americans use the Internet as a news source.<sup>3</sup> Individuals under the age of 36 who had broadband connections were more likely to use the Internet as their only source of news information.<sup>4</sup> Although the study found that web sites of traditional news organizations were the preferred vehicle of those who received their news online,<sup>5</sup> an increasing number of web users are seeking news from alternative providers.

- Throughout the 2004 campaign, bloggers were provided press credentials and access to candidates that had previously been reserved only for those who had official positions in news organizations.<sup>6</sup> In Virginia's 2005 gubernatorial race, research indicated that bloggers had significant influence on campaign strategy.<sup>7</sup>

- During the 2004 presidential election, media critics were surprised to find that Jon Stewart's *The Daily Show* was one of the primary programs that those under the age of 30 were turning to for political news.<sup>8</sup> Stewart, a self-proclaimed "fake journalist" had real impact on the campaigns.<sup>9</sup>

- Armstrong Williams, a conservative media commentator, received \$241,000 from the Department of Education to promote the

---

<sup>1</sup> "Truthiness," a word coined by Stephen Colbert, means "a devotion to information that he wishes were true even if it's not." Marc Peyser et. al, *The Truthiness Teller*, Newsweek Feb 13, 2006, at 50-51, available at <http://www.msnbc.msn.com/id/11182033/site/newsweek>. The word has inspired a cultural phenomenon; it has primarily been used to describe issues in the media. *Id.*

<sup>2</sup> Assistant Professor and Associate Chair, Department of Communication and Theater, Montana State University-Billings.

<sup>3</sup> Pew Internet and American Life Project, *For Many Home Broadband Users the Internet is a Primary News Source*, 2006, at i, [http://www.pewinternet.org/pdfs/PIP\\_News.and.Broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf) (last visited Jan. 2, 2007).

<sup>4</sup> *Id.* at iii.

<sup>5</sup> *Id.* at iv.

<sup>6</sup> Commentary, *What is a Journalist?*, CHRISTIAN SCIENCE MONITOR, Mar. 18, 2005, at 8.

<sup>7</sup> Marc Fisher, *Blogging on the Hustings*, AM. JOURNALISM REVIEW, Feb.-Mar. 2006, at 42-44.

<sup>8</sup> Vinay Menon, *Only the Jester Speaks the Truth*, TORONTO STAR, Aug. 26, 2004, at A28.

<sup>9</sup> Molly Wilow, *Political Punch: Jon Stewart Gives Clout to the Daily Show but Still Delivers Laughs*, COLUMBUS DISPATCH, May 5, 2005, at B1.

“No Child Left Behind” initiative.<sup>10</sup> As public outrage for the government’s use of journalists as propaganda agents grew, the Washington Post outed Maggie Gallagher for accepting payment from the Bush administration for her defense of traditional marriage.<sup>11</sup>

During the last six years, news about the nature of journalism and those who claim to practice it has been at the forefront of cultural criticism. While some may debate whether the individuals named above should be considered journalists, there is little doubt that the public has been attenuated to the preceding stories as critiques of the news media. Traditional definitions of journalism are being examined as new technologies and media formats have blossomed and the old news regimes have altered or adapted to these changes. While most media critics will not shed a tear over the downfall of the publisher-kings,<sup>12</sup> the broadening of the definition of journalism presents problems for those who practice journalism and those who wish to claim the protections offered by the First Amendment’s press clause. Discourse about the nature of journalism emanates from three distinct sectors: the public, the profession of journalism, and the courts. Each group offers a different perspective on how the essence of journalism should be defined.

Shifts in the definition of the profession of journalism, and even in what is labeled “news,” have important ramifications in cultural studies and for the critical turn in law. There are also significant implications for First Amendment safeguards for the press. Deciding those who may call themselves journalists has immediate consequences for the courts and Congress as each body contemplates journalistic shield laws.<sup>13</sup> I leave it to others to tackle what parameters that the definition must have in order to craft sufficient First Amendment protections for the press.<sup>14</sup> My purpose is to explore how the

---

<sup>10</sup> Howard Kurtz, *Administration Paid Commentator; Education Department Used Williams to Promote ‘No Child’ Law*, WASH. POST, Jan. 7, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A56330-2005Jan7.html> (last visited Jan. 2, 2007).

<sup>11</sup> Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C1.

<sup>12</sup> See Philip Meyer, *Saving Journalism: How to Nurse the Good Stuff Until it Pays*, COLUM. JOURNALISM REV., Nov.-Dec. 2004, at 56.

<sup>13</sup> Some, including Judith Miller, claim that the definition of journalist is a red herring in the argumentation over the scope of a shield law. See Douglas McCollum, *Attack at the Source*, COLUM. JOURNALISM REV., Mar.-Apr. 2005, at 33.

<sup>14</sup> For recent positions on how and why the judiciary should develop a Federal Shield Laws see generally Leila Wombacher Knox *The Reporter's Privilege: The Necessity of a Federal Shield Law Thirty Years After Branzburg*, 28 HASTINGS COMM. & ENT L.J. 125 (2005); Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of The Journalist's Privilege* 154 U. PA. L. REV. 201 (2006); see generally Anthony L. Fargo, *Analyzing*

changing nature of the news and journalism can be seen in light of traditional justifications for freedom of the press and how those justifications resonate with contemporary debates over the nature of journalism.

At the heart of any discussion about communication is the relationship between parties in a communicative activity. The most basic model of communication posits a speaker, or source, sending a message to an audience through a channel. Often, free speech protections are based on the source in this model: who has the right to speak? Shifting definitions of journalism affect not only whom we consider the speaker, but also what channels are accepted as legitimate for news and what types of messages should qualify for protection. Additionally, as I will argue later in this article, the key argument advanced by the courts for protecting an individual journalist is that the value of news is in its dissemination to the public. Thus, the debate over what constitutes the essence of journalism can not be located solely in the attributes of the individual claiming to be a journalist.

In order to develop this issue more fully I will first discuss the controversy within journalism about the changing nature of the profession. Next, I will turn, briefly, to the court's articulations of the definition of journalist. Finally, I will compare the value justifications that have been offered by legal philosophers for protections of the press and First Amendment rights in general in order to argue that journalism should be considered an inclusive, rather than exclusive, term.

#### DEFINING JOURNALISTS: THE PUBLIC AND THE PROFESSION

What counts as news? Who should be sanctioned to gather, create and disseminate news? These questions receive different answers depending on who is asked. While the public has a broad definition of journalism and news, the profession constantly engages in boundary work<sup>15</sup> that is at odds with its own insistence on not drawing solid lines around who may practice journalism.

To claim oneself as a journalist requires no formal training, no licensing, and no official employment.<sup>16</sup> Those who travel the traditional route to journalism, by enrolling in a university journalism school, are often admonished to become expert in the subject on

---

*Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006).

<sup>15</sup> See generally Ron Bishop, *From Behind the Walls: Boundary Work by News Organizations in their Coverage of Princess Diana's Death*, 23 J. COMM. INQUIRY 90 (1999).

<sup>16</sup> Calvert also makes this argument. See Clay Calvert, *And You Call Yourself a Journalist? Wrestling With a Definition of 'Journalist' in the Law*, 103 DICK. L. REV. 411, 431 (1999).

which they hope to report; i.e. economics, government, business.<sup>17</sup> Thus, nothing in the transcript of a college graduate who practices journalism can be marked as a qualifying exam.<sup>18</sup> Journalists have resisted concrete professional boundaries, especially government or professional licensing; in part as an assertion of their First Amendment rights,<sup>19</sup> and in part because the mythic journalist is envisioned as a free spirit whose search for truth is independent of an organizational mandate.

Systems of exclusion for the field were possible into the late 1980s when cameras and editing and printing technologies were bulky and expensive, requiring all but the most tenacious journalists to find employment within a news organization. Steve Jobs,<sup>20</sup> Tim Berners-Lee<sup>21</sup> and the Sony Corporation each have enabled individuals to create and distribute their own news. As communication technology prices sharply declined and the devices necessary to produce news became more portable, official news sources changed the way they gathered and disseminated stories.<sup>22</sup> Possibilities for citizen journalists expanded; few financial and technological barriers impeded any individual from sharing information. The Project for Excellence in Journalism found that “[t]oday, technology is transforming citizens from passive consumers of news produced by professionals into active participants who can assemble their own journalism from disparate elements.”<sup>23</sup>

Additionally, transformations in the infrastructure of mass communication, including satellite and digital television transmission, high

---

<sup>17</sup> See Kathleen Hansen, *Values and Competencies from the Clash of Professional and Academic Cultures*, 60 JOURNALISM & MASS. COMM. EDUCATOR 130, 130 (2005).

<sup>18</sup> See generally Ronald Bishop, *The Accidental Journalist: Shifting Professional Boundaries in the Wake of Leonardo DiCaprio's Interview with Former President Clinton*, 5 JOURNALISM STUD. 31 (2004).

<sup>19</sup> In particular, journalists and the Supreme Court have roundly condemned creating a licensing system because it is felt that it would give the government too much power to control content by limiting those who may practice journalism. See *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>20</sup> Apple Computers, a company founded by Mr. Jobs, has been an innovator in making desktop publishing, video editing, and media manipulation tools accessible to the masses.

<sup>21</sup> Berners-Lee is credited with inventing the World Wide Web. In the video production, *Epic 2014*, produced by Robin Sloan for the Museum of Media History, Berners-Lee is cited as contributing to the change in journalism. See *Epic 2014*, <http://epic.lightover.com/> (last visited Jan. 2, 2007).

<sup>22</sup> See Stephen Quinn, *Convergence's Fundamental Question* 6 JOURNALISM STUD. 29, 31 (2005) (describing how CNN sent a reporter to the Indonesian jungle with only a digital video camera, a mobile phone and a laptop).

<sup>23</sup> Project for Excellent in Journalism, *The State of the News Media, Overview*, (2005) [http://www.stateofthenewsmedia.org/2005/narrative\\_overview\\_intro.asp?cat=1&media=1](http://www.stateofthenewsmedia.org/2005/narrative_overview_intro.asp?cat=1&media=1) (last visited Jan. 2, 2007).

speed internet, and mobile phones have altered the public's expectations and appetites for the news. The 24 hour news cycle, brought about by the rise of the all-news networks, has led audiences to expect news delivered immediately and accurately, often an impossible balance to achieve.<sup>24</sup>

The public accepts multiple platforms for news delivery. While traditional newspapers and broadcast networks continue to find audiences; documentary films, partisan news programming, and blogs are drawing increased interest from the public.

Michael Moore's films, especially *Fahrenheit 9/11*, drew large numbers of viewers<sup>25</sup> while casting a critical eye on journalism.<sup>26</sup> Jon Stewart, Stephen Colbert, Tucker Carlson, Bill O'Reilly, and Tim Russert all attract large partisan audiences who are loyal and consistent viewers. The Air America radio network, launched in 2004 as a response to Rush Limbaugh and the perceived conservative slant of talk radio, precipitated a surprising growth in liberal radio programming.<sup>27</sup> Blogs represent perhaps the largest voice in alternative news. While it is difficult to locate precise numbers, estimates indicate that over 500,000 posts were made per day to web logs in 2005.<sup>28</sup> Ironically, despite the public's embrace of these alternate sources for news, there is a growing sense of distrust with the news media. Melanie Sill observed, "[l]isten to talk radio, spend time in Internet forums or Web sites, . . . you'll see how much hostility rages toward this undefined power called 'the media.'"<sup>29</sup>

Traditional news outlets find themselves confronting numerous credibility problems. The commoditization of the news, the blurring of news and entertainment, and corporate downsizing all represent significant threats to journalism. News as a product, produced by

<sup>24</sup> For problems with the 24 hour news cycle in the field of journalism see Pam Perry, *Study Shows Changes Coming for J-School Students*, QUILL, May 2004, at 32. See also Dave Kansas & Todd Gitlin, *What's the Rush*, 13 MEDIA STUD. J. 72 (1999) (noting the obstacles to accuracy within the 24-hour news cycle system).

<sup>25</sup> *Bowling for Columbine* made \$21.6 Million in 2002, while *Fahrenheit 9/11* holds the all time box office record for a documentary with earnings of \$119.2 Million. Scott Bowles, *Documentaries Proving the Real Deal*, USA TODAY, Aug. 2, 2005, <http://www.azcentral.com/ent/movies/articles/0803documentaries.html> (last visited Jan. 2, 2007).

<sup>26</sup> Rose Economou, *Documentaries Raise Questions Journalists Should Ask Themselves*, NIEMAN REPORTS, Fall 2004, at 81 (stating that *Fahrenheit 9/11* is an indictment on American journalism by highlighting the important stories behind the war in Iraq that journalists failed to cover).

<sup>27</sup> Richard Corliss & Carolina A. Miranda, *Radio's Bushwackers Make it Through Year One*, TIME MAG., Apr. 4, 2005, at 18.

<sup>28</sup> Andrew P. Madden, *The Business of Blogging*, TECHNOLOGY REVIEW, Aug. 2005, at 37.

<sup>29</sup> Melanie Sill, *We Define Journalism by Doing it*, NIEMAN REPORTS, Winter 2004, at 55.

fewer staff members, and focused on increasing audiences at any cost, has serious credibility problems.

Even absent these threats, newspapers may be responsible for their own lack of standing with the public. A recent study by Maier found a 61% error rate in newspapers; many of these errors were factual mistakes that could have been easily checked; he concludes “[t]he study underscores the relationship between media accuracy and credibility. The greater the number and severity of errors found in an article, the less credible was the story . . . .”<sup>30</sup> While journalists may argue that public pressure to deliver news promptly and corporate pressure to deliver news cheaply make errors inevitable, the public sees only that traditional newspapers are no more reliable than any other media source.

Public perception that the news media is liberally biased, although likely based on innuendo,<sup>31</sup> contributes to a lack of trust in the institution. Mark Carbanoro, in a letter to the editor published by the Columbia Journalism Review, asserts:

[m]iddle America doesn’t just live in the “fly-over” country of the Red States. Middle America is not a geographical location; it’s a state of mind and a set of values. To me, part of the reason for circulation decline is the fact that for many Middle Americans, we don’t see our values reflected in the nation’s news coverage. We are derided as “ignorant rubes” who need to be re-educated by elitists in the media as to how to raise our children, lead our lives, who to vote for, etc.<sup>32</sup>

Akin to the dissatisfied news consumer above, most of the attack on journalism is primarily instigated from the right. However, the entire political spectrum has found fault with the press.<sup>33</sup> This distrust is likely grounded in the difference between what journalists profess themselves to be and what the public witnesses in the news on a daily basis.

Journalists themselves may be responsible for their lack of position in the public’s eye. Thomas Kunkel, president of the American Journalism Review and Dean of the University of Maryland’s Phillip Merrill College of Journalism opined “[a]nd the truth is, we journal-

---

<sup>30</sup> Scott R. Maier, *Accuracy Matters: A Cross-Market Assessment of Newspaper Error and Credibility*, 82 JOURNALISM & MASS. COMM. Q. 533, 545 (2005).

<sup>31</sup> See generally ERIC ALTERMAN, WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS IN THE NEWS (2003) (including a painstakingly researched analysis that debunks the claim that the media is a liberal elite).

<sup>32</sup> Mark Carbanoro, *Losing Middle America*, AM. JOURNALISM REV., Jun.-Jul. 2005, at 72.

<sup>33</sup> Douglas McCollum, *Attack at the Source*, COLUM. JOURNALISM REV., Mar.-Apr. 2005, at 31.

ists bear a lot of responsibility for this sorry state. We have seen some spectacular ethical lapses which further erode media credibility. We have arrogance issues.”<sup>34</sup> William E. Lee, a professor of journalism at the University of Georgia, recently claimed that journalists see themselves as a “Priestly Class.”<sup>35</sup>

These arrogance issues spill over into the debate over who should be considered a journalist. While the venues and appetites for news grow on the American scene, journalists are waging an internal war on who has the right to gather and disseminate news.<sup>36</sup>

Journalism has grounded its definition of itself in a narrative of “objectivity.”<sup>37</sup> Despite the increasing partisanship of news sources, particularly cable news networks, journalists continue to claim that they function as unbiased observers. Journalists repeatedly differentiate themselves from what they consider the “pretenders” by claiming they are able to offer objective reporting. Zelizer notes, “Journalism prides itself on a respect for the facts, truth and reality.”<sup>38</sup>

Journalists point to their ability to witness, record and quickly write a story that is unbiased; they see themselves as serving as the eyes and ears of the public.<sup>39</sup> While these professional attributes are repeated frequently in journalism textbooks and in reflections by practicing journalists, they do not constitute a clear description of the work of newsgathering. Rather than creating an essential list of what counts as journalism, the profession uses dissociative<sup>40</sup> reasoning in

<sup>34</sup> Thomas Kunkel, *The Rout Is On: And it's Open Season on Journalists*, AM. JOURNALISM REV., Apr.-May 2005 at 4.

<sup>35</sup> See generally William E. Lee, *The Priestly Class: Reflections on a Journalist's Privilege*, 23 CARDOZO ARTS & ENT. L.J. 635 (2006).

<sup>36</sup> For example, Fred Brown, *Citizen Journalism is not Professional Journalism*, QUILL, Aug. 2005, at 42, argues that “[a] traditional journalist's responsibility is to find and report new information—new, accurate information. Blogs are good at finding the flaws in others' information. They're not so much seeking new facts and reporting them; they're seeking to rebut the ‘facts’ others report.”

<sup>37</sup> See Barbie Zelizer, *Journalists as Interpretive Communities*, 10 CRITICAL STUDIES IN MASS COMMUNICATION 219, 220 (1993).

<sup>38</sup> Barbie Zelizer, *When Facts, Truth, and Reality are God-Terms: On Journalism's Uneasy Place in Cultural Studies*, 1 COMMUNICATION & CRITICAL/CULTURAL STUDIES 100, 100 (2004).

<sup>39</sup> The Christian Science Monitor posits, in an editorial written by its staff, that:

[n]ot everyone who simply gathers information and disseminates it can be called a journalist. The craft requires skill in finding story ideas and facts, cultivating sources, and then presenting news in a way that serves the public interest. It requires specific talents for research, interviews, and distillation of information; sifting rant from reality; and then presenting it with clarity, accuracy, speed, and relevance. In giving access to a reporter, newsmakers must be mindful of those essential skills.

Commentary, *What is a Journalist?*, CHRISTIAN SCIENCE MONITOR, Mar. 2005, at 8.

<sup>40</sup> I refer here to Chaim Pereleman and Lucie Olbrechts-Tyteca's argument scheme by which an arguer attempts to remove an incompatibility in order to develop a distance between what is valued (in this case journalism) and what is devalued (paparazzi, bloggers, entertain-



order to develop its boundaries. The field has developed narratives to explain who should be excluded and what factors are to be lauded in the practice of journalism.<sup>41</sup> When confronted with alternative styles of news gathering and reporting; journalists and academicians are quick to discount or marginalize these forms.<sup>42</sup>

There is obviously a difference between the public's definition and the profession's definition of what constitutes journalism. Some may ask why the field shouldn't be permitted to create its own limits, police its own practitioners, and determine its own role in society?<sup>43</sup> Physicians, lawyers, and accountants, to name just a few professions, have the power to exclude those who do not meet their standards. Journalism, however, resides in a unique place in the American culture. Its status and protections are designed to increase voices; to allow more speech. As I turn to an analysis of the legal arguments offered in the definitions of journalism, one principle emerges from each case; the value in protecting the press is that it increases the ability for citizens to make informed decisions. Press freedoms are essential because they serve the public.

#### DEFINING JOURNALISTS: THE FEDERAL COURTS<sup>44</sup>

The courts have primarily developed the definition of who counts as a journalist in cases that entail who has the right to claim reporter's privilege. While other press freedoms are implicated by this characterization, this issue has been the focal point for the judicial definition process. The press is a particularly difficult entity to define; the nature of the profession, including the importance of protecting it from

---

ment). See CHAIM PERELEMAN AND LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 411-12 (1969).

<sup>41</sup> Barbie Zelizer, *Journalists as Interpretive Communities*, 10 *CRITICAL STUDIES IN MASS COMMUNICATION* 219, 220 (1993). Zelizer analyzed the discourse from the journalism field around Watergate and McCarthyism in order to determine what values and practices were valorized. *Id.*

<sup>42</sup> See Chris Atton, *News Cultures and New Social Movements: Radical Journalism and the Mainstream Media*, 3 *JOURNALISM STUD.* 491, 492 (2002) (explaining how mainstream media attempts to degrade activist media forms).

<sup>43</sup> See generally Timothy P. Vos, *Journalistic Role Conception: A Bridge Between the Reporter and the Press* (Mar. 2005), a paper presented at the International Communication Association Annual Conference in New York City for a description of how journalists use role conceptions as a way to guide their practices.

<sup>44</sup> States have enacted separate shield laws of varying degrees, most of which include definitions of journalists. For an extensive analysis of these laws, including a discussion of who is protected see Laurence B. Alexander & Leah G. Cooper, *Words that Shield: A Textual Analysis of the Journalist's Privilege*, 18 *NEWSPAPER RES. J.* 51, 53-55 (1997). Nestler, *supra*, note 14 at 225-227 also provides an extensive list of the states' shield laws.

government interference, defies attempts to draw boundaries around the profession.

*Branzburg v. Hayes*<sup>45</sup> is the only Supreme Court case to squarely tackle the issue of journalist's privilege. The *Branzburg* decision encompasses three reporters who each were called upon to testify before a grand jury: Branzburg, Caldwell and Pappas. Each journalist was officially working for a traditional news source: Branzburg for the *Louisville Courier*, Pappas, a television photographer, for the Providence office of a New Bedford station,<sup>46</sup> and Caldwell for the *New York Times*.<sup>47</sup> The *Branzburg* decision is unique in that these reporters each had access to information about criminal issues and each was unquestionably an investigative journalist. Their defense of their right to shield their sources from grand jury investigation was based on the claim that they required the ability to provide their sources with confidentiality to insure that they could uncover news that would otherwise be unavailable to the public.<sup>48</sup>

White's majority opinion hinges on the lack of distinction between the press and the average citizen granted by the law.<sup>49</sup> He locates three relevant comparisons<sup>50</sup> to argue that the press should not be granted any special distinction when weighing its value to the free flow of information with that of the general public.

Although only incidental to White's argument, he penned this prescient statement:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a

---

<sup>45</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>46</sup> *Id.* at 672.

<sup>47</sup> *Id.* at 675.

<sup>48</sup> *Id.* White summarizes the claims of the three reporters this way: "if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment" *Id.* at 679-80.

<sup>49</sup> Anthony Fargo has found that "[t]he [United States] Supreme Court has consistently refused to grant special rights and privileges to the press that are not available to the public at large." Anthony Fargo, *Reconsidering the Federal Journalist's Privilege for Non-Confidential Information: Gonzales v. NBC*, 19 CARDOZO ARTS & ENT. L.J. 355, 359 (2001).

<sup>50</sup> See *Branzburg*, 408 U.S. at 684-85. White notes that (1) Journalists do not have a right to special access to information not available to the public generally (2) Journalists are regularly excluded from grand jury proceedings and other private meetings, and (3) Journalists have no rights to the scenes of crime or disaster when the public is excluded. *Id.*

mimeograph just as of the large metropolitan publisher who utilizes the latest photocomposition methods.<sup>51</sup>

White envisions a never ending parade of professions that would qualify as journalists given the argument forwarded for protecting journalists because of their ability to inform the public including: “lecturers, political pollsters, novelists, academic researchers, and dramatists.”<sup>52</sup>

Both Douglas and Stewart premise their dissents in *Branzburg* on the value of the public’s right to receive information.<sup>53</sup> Their arguments are founded on the value of protecting the free flow of information in order to guard democracy.<sup>54</sup> While both dissents vigorously support the importance of protecting a reporter’s relationship with a source of information,<sup>55</sup> neither attempts to define the term “journalist”. Douglas’ dissent hints that journalists should be independent sources of information, but otherwise makes no other attributions about the nature of journalism.<sup>56</sup>

In the end, the arguments about the character of a free press and the role of journalists debated in *Branzburg* contribute little that helps journalists understand the parameters of their position. Neither White’s adamant argument that journalists not be treated as a special class of citizen, nor Douglas’ and Stewart’s position of protecting a

---

<sup>51</sup> *Id.* at 703-04 (citing in re Grand Jury Witnesses 322 F. Supp 573, 574 (N.D. Cal. 1970)).

<sup>52</sup> *Branzburg*, 408 U.S. at 705.

<sup>53</sup> Douglas eloquently argues that “[t]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public’s right to know.” *Id.* at 721. While Stewart notes that “[t]he reporter’s constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public.” *Id.* at 725. Later in his opinion, he remarks that:

    this protection does not exist for the purely private interests of the newsman or his informant, nor even, at bottom, for the First Amendment interests of either partner in the news gathering relationship. Rather, it functions to insure nothing less than democratic decision making through the free flow of information to the public . . . .

*Id.* at 737-38.

<sup>54</sup> Douglas cites Alexander Meiklejohn extensively. *Id.* at 713-15.

<sup>55</sup> Stewart’s dissent creates a long causal chain that links the lack of protection of sources with the decrease in the public’s ability to receive information. “A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.” *Id.* at 727

<sup>56</sup> Douglas is wary of reporters becoming tools of the government without sufficient protections. His opines that “[i]f what the Court sanctions today becomes settled law, then the reporter’s main function in American society will be to pass on to the public the press releases which the various departments of the government issue.” *Id.* at 722. This an eerily accurate description of the way that journalism has been appropriated by the government in the *Armstrong Williams* and *Maggie Gallagher* cases.

vital marketplace of ideas provide any guideline as to who might expect protection from the Court.

Three subsequent federal cases attempt to more accurately define who may consider themselves a journalist: *von Bulow v. von Bulow*,<sup>57</sup> *Shoen v. Shoen*,<sup>58</sup> and *in re Madden*.<sup>59</sup> While other cases<sup>60</sup> have grappled with definitions of journalism, these three are the most relevant to understanding the court's development of criteria for who should receive protections afforded to the press.

*von Bulow* concerns the claims of Andrea Reynolds, a friend of Claus von Bulow, who was accused of murdering his wife. Reynolds was ordered to surrender notes she had made about the von Bulow children following the death of their mother so that her children could use them in a civil lawsuit they were pursuing against Klaus von Bulow. Reynolds claimed that she was intending to write a book,<sup>61</sup> and as such, could invoke a journalist's privilege.

Two important criteria for defining journalists emerge from the *von Bulow* decision. The first is that a journalist must embark on a project with the intent to gather information for dissemination to the public.<sup>62</sup> This is the single most important standard set by the court, "the talisman invoking the journalist's privilege is intent to disseminate to the public at the time the gathering of information commences."<sup>63</sup> The court makes no distinction on how this information is to be disseminated; any possible venue is protected.<sup>64</sup> In an interesting turn, the *von Bulow* decision uses White's warning that defining journalism would open a Pandora's box of demands for journalist's privilege from a variety of individuals, in order to argue that the journalist's privilege may be "sought by one not traditionally associated with the institutionalized press."<sup>65</sup>

---

<sup>57</sup> *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987).

<sup>58</sup> *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

<sup>59</sup> *In Re Mark Madden v. Turner Broadcasting*, 151 F.3d 125 (3d Cir 1998).

<sup>60</sup> See *Silkwood v. Kerr-McGee* 563 F.2d 433 (10th Cir. 1977); *Gonzales v. Pierce*, 186 F.3d 102 (2d Cir 1998).

<sup>61</sup> Reynolds made several claims that she was entitled to journalistic privilege including that she had a Polish press card and that she was drafting a story on von Bulow for a German magazine. *von Bulow*, 811 F.2d at 139.

<sup>62</sup> *Id.* at 142.

<sup>63</sup> *Id.* at 145.

<sup>64</sup> See *id.* at 144 ("[t]he indented manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like . . ."). Reynolds did not meet this standard because she did not begin with the intent to disseminate; instead, her counsel conceded at oral argument that she began gathering evidence to vindicate Claus von Bulow. *Id.* at 145.

<sup>65</sup> *Id.* at 144-45.

The second standard developed in the case is that one who claims journalist's privilege be involved in "activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press."<sup>66</sup> No clear delineation is provided by the court as to what constitutes these activities, instead the court concludes that Reynolds's notes did not fit this standard.<sup>67</sup>

*Shoen v. Shoen*<sup>68</sup> is the next significant step in the courts' attempt to define journalism. In this case, Ronald Watkins had written a book regarding the Shoen family, who had been feuding over control of the U-Haul Company. The book, entitled *Birthright*, was in production at the time this case reached the court of appeals.<sup>69</sup> Leonard Shoen, the patriarch of the family, had granted Watkins a series of interviews in exchange for a share of the royalties from the work.<sup>70</sup> Sons Mark and Edward Shoen brought a defamation claim against their father, stating he had falsely linked them to the murder of their sister-in-law.<sup>71</sup> While the *Shoen* case does not significantly alter the *von Bulow* decision, it asks "does an investigative book author have standing to invoke journalist's privilege?"<sup>72</sup> Thus, the court begins to address how far the extension of journalist's privilege can be taken beyond the traditional news media.

In finding that Watkins did deserve the right to protect his information, the court concluded: "[t]he journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance."<sup>73</sup>

After identifying several authors who have made significant contributions to American culture,<sup>74</sup> the court makes the bold statement that "[w]hat makes journalism journalism is not its format but its content."<sup>75</sup> The court found in favor of Watkins.<sup>76</sup>

---

<sup>66</sup> *Id.* at 142.

<sup>67</sup> *Id.* at 146.

<sup>68</sup> *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

<sup>69</sup> *See id.* at 1290.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1292.

<sup>73</sup> *Id.* at 1293.

<sup>74</sup> "[S]ocial critics such as Rachel Carson, Ralph Nader, Jessica Mitford, and others have written books that have made significant contributions to the public discourse confronting the American people." *Id.*

<sup>75</sup> *Id.*

*In re Madden*<sup>77</sup> is a case that exemplifies what many critics consider the worst practices in journalism. Mark Madden was an employee of Turner Broadcasting's affiliate World Championship Wrestling.<sup>78</sup> He produced taped commentaries which were played when callers dialed a 900 number.<sup>79</sup> These reports were a cross between advertising and sports information; they included promotional material for upcoming pay-per-view wrestling events, results of matches and features on wrestlers.<sup>80</sup> Madden was subpoenaed to provide the names of sources who allegedly provided false and misleading statements that he repeated over his 900 line.<sup>81</sup> Madden refused to divulge those sources, claiming journalist's privilege.<sup>82</sup>

The court found against Madden.<sup>83</sup> This time the majority viewed White's admonition as a warning to limit those who qualify as journalists. Citing the *von Bulow* and *Shoen* cases, this court provided a more focused definition of journalism: "[w]e hold that individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate this information to the public."<sup>84</sup> In concluding that Madden did not pass this test, the court reasons that Madden was an entertainer who disseminated "hype, not news."<sup>85</sup>

The concluding paragraph of the decision provides perhaps the most clear test that an individual must pass to claim the status of a journalist: "individuals claiming the protections of the journalist's privilege must demonstrate the concurrence of three elements: that they 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the news-gathering process to disseminate this news to the public."<sup>86</sup> This finding goes far beyond the *von Bulow* ruling, limiting journalists to those who are inves-

---

<sup>76</sup> *Id.* at 1294. Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 754 (1994), concludes that Watkins was protected by the journalist's privilege and Reynolds was not because:

a professional who has an affiliation with a legitimate medium and who appears to be sincere about the claim of privilege is more likely to be granted standing. If the person claiming the privilege appears to claim it solely to prevent the production of documents or to refuse to testify, standing should be rejected.

<sup>77</sup> *In re Madden*, 151 F.3d 125 (3d Cir. 1998).

<sup>78</sup> *Id.* at 126.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 126-27.

<sup>83</sup> *Id.* at 131.

<sup>84</sup> *Id.* at 130.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 131.

tigating news items. This court does not provide a clear definition of what constitutes news.

These three cases, taken together provide not only a test for who can claim the rights of journalists, but also offer a consistent value position that implicates what role that journalists should serve in the culture. Each case clearly articulates a strong propensity for protecting journalists because they serve the public by increasing the free flow of information.<sup>87</sup>

#### VALUING SPEECH AND THE PRESS: WHO BENEFITS FROM THE FIRST AMENDMENT?

Three value positions are commonly advanced to defend the first amendment: 1) the first amendment protects individual self expression; 2) the first amendment promotes a marketplace of ideas; and 3) the first amendment promotes democratic self governance.<sup>88</sup> A fourth value which is often attributed to the first amendment is that it aids in the discovery of truth, but that value is often subsumed by the value of the marketplace of ideas.<sup>89</sup> Except for the value of individual self expression, the values ascribed to freedom of speech concern the ability of an audience to have access to a variety of messages. Speech, therefore, is not a terminal value, but an instrumental value because it is necessarily directed to another person. Freedom of the press, in particular, finds most of its reason for being in the public's right to have access to information about its government. The press, in essence, receives its special protection because it serves the public, not because journalists have a unique right to expression.

---

<sup>87</sup> Both the language of *von Bulow* and *Shoen* are strong statements about the public's right to know. Timber's writes in *von Bulow*, "[f]irst, the process of newsgathering is a protected right under the first Amendment, albeit a qualified one. This qualified right, which results in the journalist's privilege emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public." *von Bulow*, 811 F.2d at 142.

Norris' opinion in *Shoen* echoes this value closely stating "[r]ooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed for the administration of justice.'" *Shoen*, 5 F.3d at 1292 (citing *Herbert v. Lando*, 441 U.S. 153, 183 (1979) (Brennan, J., dissenting) (quoting MCCORMICK ON EVIDENCE 152 (2d ed. 1972))).

Finally, in *Madden*, Nygaard argues, "[p]remised upon the First Amendment, the privilege recognizes society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public." *Madden*, 151 F.3d at 128.

<sup>88</sup> RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6-17 (1992).

<sup>89</sup> This is the traditional position advocated by John Stuart Mill. See JOHN STUART MILL, ON LIBERTY, (London: Longman, Roberts & Green 4th ed. 1869) (1859), available at <http://www.bartleby.com/br/130.html> (last visited Jan. 2, 2007).

Steven Shiffrin argues, “[a] major purpose of the first amendment . . . is to protect the romantics—those who would break out of classical forms: the dissenters, the unorthodox, the outcasts[.]”<sup>90</sup> If Shiffrin’s admonition is applied to journalists, it would be imperative to protect as many types of journalism as possible because the diversity of forms would maximize the types of information available to audiences. In particular, blogs provide audiences with an infinite possibility of perspectives. Providing unlimited protection to bloggers poses problems to some theorists,<sup>91</sup> but creating bright lines around who is entitled to use the web to disseminate information as a journalist will likely backfire.

Frederick Schauer argues that even the protection of the individual is really a value concerned with the audience. One of the primary arguments Schauer develops is that speech is an “other regarding act.”<sup>92</sup> Schauer concludes that all the values advanced for recognizing the importance of freedom of speech—truth, individuality, and democracy—can be supported if freedom of speech is recognized as freedom of communication, “any particularized argument for freedom of speech focuses on the communicative aspects of speech, although the various arguments differ in the way they value communication.”<sup>93</sup> Journalism’s essential function is in its relationship to the other; it can claim no speech rights of its own. Tom Rosensteel placed journalism’s fate in its ability to deliver information to an audience when he addressed an audience in Eugene, OR in 2003. Journalism “has a single purpose: to put information that was once held by the few into the hands of many so they could be sovereign. Without journalism democracy is not possible. Without democracy, journalism has no purpose other than profit. Journalism and democracy will rise and fall together.”<sup>94</sup>

---

<sup>90</sup> STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1990).

<sup>91</sup> Fargo notes that:

blogs cover a wide range of topics and come in many different forms. Should the law protect them all? Probably not, but how does one choose? Some who favor a federal shield law argue that it must include non-traditional journalists to be fair to all who do the work the public typically defines as journalism. One way to be fair while not extending the privilege to everyone with a computer would be to limit the privilege only to those reporting on issues of public concern.

Fargo, *supra* note 14, at 72.

<sup>92</sup> FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 10-12 (1982).

<sup>93</sup> *Id.* at 95.

<sup>94</sup> Tom Rosensteel, *Snob Journalism: Elitism Versus Ethics for a Profession in Crisis*, (May 22, 2003), <http://www.journalism.org/node/310> (last visited Jan. 2, 2007).



## CONCLUSIONS

While the courts struggle with the role of the press and what protections should be given to journalists, journalists themselves would be wise to reference the values and definitions articulated by the courts. While journalists are drawing boundaries that are meant to distinguish themselves from the general public; the court is not concerned with the same issues with which journalists are obsessed. Indeed, the court has a much more inclusive definition of who should qualify as a journalist than the profession allows. Zelizer warns that journalism's impulse to differentiate itself from others who produce meaning may limit its possibilities. "The different tools of journalism, different kinds of journalisms and similarities between journalism and the world outside are brought together to illuminate the nuanced and textured character of journalism in all of its possibilities."<sup>95</sup>

The central tenet of many of the court's decisions is that freedom of the press is derivative; it emanates from the public's right to receive information. As such, the courts are not interested in matters such as objectivity, truth or reality. Instead, the test most frequently supported by the district courts is that the journalist intends to disseminate information to the public.<sup>96</sup> No distinction is made about the quality of the information, whether that information is factual or based on opinion, or what technology is being used to distribute it.

The public is best served by a broad definition of journalism.<sup>97</sup> Possibilities for transformation of the political and economic culture are only available when alternate voices have a platform. Atton provides the example of radical journalists who use their roles as part of a social group to influence audiences.<sup>98</sup> Journalism must speak to its audience; whether that journalism is traditional news broadcast or published by a large corporation, a blog uploaded by a citizen journalist, or a fake news show aired on Comedy Central. Sill aptly states, "[g]ood journalism should speak for itself, but that only works if people are reading or listening."<sup>99</sup>

---

<sup>95</sup> Zelizer, *supra* note 38, at 102.

<sup>96</sup> "For those adhering to the marketplace of ideas interpretation of the First Amendment, a privilege for journalists makes intuitive sense because it encourages the dissemination of more information . . . ." Nestler, *supra* note 14, at 211.

<sup>97</sup> As early as 1938 the Supreme Court noted the importance of not limiting the press to newspapers. In *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), Cardozo opines, "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

<sup>98</sup> Atton, *supra* note 42, at 493.

<sup>99</sup> Sill, *supra* note 29, at 55.